

PUBLIC PROSECUTOR

v.

Z

HIGH COURT MALAYA, ALOR SETAR  
TUAN MOHD HISHAMUDDIN BIN HJ. MOHD YUNUS J  
[JUVENILE APPEAL NO. 41-153-94]  
17 JUNE 1995

**CRIMINAL LAW & PROCEDURE:** *Juvenile Court - Accused charged under ss. 12(2) & 6 of the Dangerous Drugs Act 1952 - Prosecuting officer applying for dismissal not amounting to acquittal (DNAA) - Magistrate citing lack of jurisdiction to grant application - Accused acquitted and discharged on Court's own volition - Whether Magistrate had the power to order DNAA under the Juveniles Courts Act 1947 - Whether Juvenile Court trials are governed exclusively by the JCA 1947 - Section 4(3) JCA 1947 - Consideration of s. 254(1),(2) & (3) of the Criminal Procedure Code.*

**STATUTORY INTERPRETATION:** *Section 254(1) & (2) of the Criminal Procedure Code - Decision to proceed with charge - Distinction between decision by public prosecutor and public officer - Discretion of Court to discharge an accused.*

This was an appeal by the prosecution against the order of the Juvenile Court acquitting and discharging the respondent of two charges under ss. 6 & 12(2) of the Dangerous Drugs Act 1952. The order was made of the Court's own volition following an application by the prosecuting officer for a discharge not amounting to acquittal (DNAA) pursuant to s. 254(2) of the Criminal Procedure Code (CPC) on the ground that the learned Magistrate had no power under the Juvenile Courts Act 1947 (JCA) to order a DNAA and that Juvenile Court trials were exclusively governed by the JCA and not the CPC.

The issue was whether the learned Magistrate had erred in law in making the said order.

**Held:**

[1] Section 4(3) of the JCA applies the provisions of the CPC to Juvenile Courts. Therefore in Juvenile Court trials it would be in order for the prosecuting officer to make an application under s. 254(2) of the CPC.

[2] As provided by s. 254(3), when an accused is discharged either pursuant to subsection (1) or (2), such discharge does not amount to an acquittal unless the Court directs otherwise. This means that the Court does have the power to order an acquittal. However, the Court should always consider the question whether the discharge should amount to an acquittal or not. Normally, the discharge should amount to an acquittal unless good cause is otherwise shown. But before the Court makes a decision both the accused or his Counsel and the prosecution must be given the opportunity of being heard. The power should be exercised judicially.

[3] A prosecuting officer when making an application under s. 254 of the CPC, should take pain to inform the Court in clear terms the position in which the decision not to proceed is made. He should inform the Court whether he, on his own initiative, proposes not to proceed any further on the charge, in which case he should apply under subsection (2); or whether he is directed by the public prosecutor not to proceed further on the charge, in which case he should apply under subsection (1). A prosecuting officer should not merely inform the Court in vague terms such as, for example, that he is applying for a discharge not amounting to acquittal, as is quite commonly done. Such practice must cease.

- a* [Order of Magistrate set aside, case referred back to the Juvenile Court for prosecution to make proper application under s. 254(1) or (2)].

**Cases referred to:**

*Public Prosecutor v. Zainuddin & Anor.* [1986] 2 MLJ 100 (*refd*)

*Public Prosecutor v. Md. Zain* [1948-49] MLJ Supp 142 (*refd*)

*Poh Cho Ching v. Public Prosecutor* [1982] 1 MLJ 86 (*refd*)

*b*

**Legislation referred to:**

Dangerous Drugs Act 1952, ss. 6, 12(2)

Dangerous Drugs (Special Preventive Measures) Act, 1985

Juvenile Courts Act 1947, s. 4(3)

Criminal Procedure Code, s. 254(1), (2), (3), 376

*c* For the appellant - Abdul Razak bin Musa, DPP

For the respondent - Darshan Singh

**JUDGMENT**

**Mohd Hishamuddin bin Mohd Yunus J:**

- d* The Juvenile Court at Sungei Petani had acquitted and discharged the respondent on 25 June 1994 of two charges, that is, under s. 12(2) and s. 6 of the Dangerous Drugs Act 1952. The prosecution now appeals against the order of acquittal.

The order of acquittal was made by the learned presiding Magistrate following an application by the prosecuting officer for a "DNAA" which is commonly understood to mean discharge not amounting to an acquittal.

- e* The notes of proceeding state the following:

25 June 1994

P.O.: K/Insp. Santhira.

Penasihat (1) En. Abu Bakar

(2) En. Tang Thean Chin.

*f*

En. Darshan bagi pihak [pesalah].

Pesalah berada di bawah perintah sekatan di bawah Akta 316.

P.O.: Pohon DNAA

*g*

En. Darshan: Adalah tanggungjawab Pendakwa atau polis [untuk] membawa [pesalah] ke Mahkamah sebab penjamin tidak ada kuasa lagi atas pesalah. Perintah adalah untuk dua tahun. Pohon jamin dibatalkan dan duit jamin dikembalikan kepada penjamin.

Penjamin hadir.

Mahkamah: [Pesalah] dilepaskan dan dibebaskan.

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It will be observed from the notes that the prosecuting officer, in making the application, was rather imprecise and that neither the defence Counsel nor the Court sought clarification from him but it is clear from the notes that, pursuant to the application for a discharge not amounting to an acquittal, there was no application for an order of acquittal by the learned defence Counsel the order of acquittal was made entirely on the Court's own volition.

*i*

Why did the learned Magistrate make such an order? In his grounds of judgment, the learned Magistrate opined that he had no power under the Juvenile Courts Act, 1947 (the JCA) to order a discharge not amounting to an acquittal and that juvenile Court trials

are not governed by the Criminal Procedure Code but are governed exclusively by the JCA. With respect, this is an erroneous view of the law (I will come to this shortly), but on a matter of procedural propriety I cannot help commenting here that if, indeed, he was of the opinion that, on the procedure, he was governed only by the JCA and hence had no power to entertain the prosecuting officer's application, which I presume was made pursuant to s. 254(2) of the CPC, then the proper course was for him to say so to the prosecuting officer so that the latter could submit on that point. Why did he act hastily in ordering an acquittal? And more perplexing is, if the learned Magistrate thought that the JCA did not give him the power to make the order of discharge simpliciter as requested by the prosecuting officer, then what made him to assume that he had the power under the JCA to order an outright acquittal following such a request? Under which provision of the JCA did he act upon? The learned Magistrate appears to be silent on this point in his grounds of judgment. It is elementary that Magistrates, like all others who hold public office, when carrying out their duties, are governed by the Rule of Law which is enshrined in our Rukun Negara.

In the present case, what is also disquieting is that the learned Magistrate, in his grounds of judgment, had criticised the prosecution for not proceeding with the charges and even went to the extent of speculating the reason for the imposition of the restriction order (under the Dangerous Drugs (Special Preventive Measures) Act, 1985) on the respondent. Such criticism and speculation are uncalled for and, indeed, highly improper; and the learned Magistrate may well be reminded that the restriction order has nothing to do with the prosecution: it involves a different authority - the Minister of Home Affairs. May he also be reminded here of the advice of Salleh Abas LP in *Public Prosecutor v. Zainuddin & Anor.* [1986] 2 MLJ 100, at p. 103 that:

co-operation and mutual respect between the bench and the bar in the administration of justice is so important that it should not be undermined.

and that an order of discharge amounting to an acquittal should not be made:

as an expression of anger and exasperation at or a censure against the conduct of the prosecution. Failure to exercise this power judicially will lead to injustice and inconvenience to the accused - the very purpose for which power is exercisable.

Now, the learned Magistrate in his ground of judgment states:

Saya telah menghadapi kemusykilan untuk membuat perintah sedemikian kerana seksyen 3 AMJ [Akta Mahkamah Juvana] menyatakan:

Notwithstanding anything contained in any written law relating to arrest, detention and trial of persons committing any offence, no juvenile when alleged to have committed the offence shall be arrested, detained or tried except in accordance with this Act.

In the present case, if the Magistrate had acted with propriety, that is to say, if only he had not acted hastily but was patient enough to give the prosecuting officer the opportunity to submit on his (the Magistrate's) doubt on the law, in all probability the prosecuting officer would have brought to his attention subsection (3) of s. 4 of the JCA which reads:

4. Constitution, jurisdiction and procedure of Juvenile Court.

(1) ...

...

- a* (3) Save as modified or extended by this Act, the provisions of the Criminal Procedure Code shall apply to Juvenile Courts as if Juvenile Courts were Court of a Magistrate of the First Class.

By virtue of this provision, which applies the provisions of the CPC to Juvenile Courts, therefore, in Juvenile Court trials it would be in order for the prosecuting officer to make application under s. 254(2) of the CPC.

- b* Now s. 254 of the CPC states:

254. Public prosecutor may decline to prosecute further at any stage.

- c* (1) At any stage of any trial, before the delivery of judgment, or in the case of a trial by jury before the return of the verdict, the public prosecutor may, if he thinks fits, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on such charge against the accused shall be stayed and the accused shall be discharged of and from the same.

- d* (2) At any stage of any trial before a Sessions Court of the Court of a Magistrate before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on such charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.

- (3) Such discharge shall not amount to an acquittal unless the Court so directs.

- e* It is important to note the difference between subsection (1) and subsection (2). The former refers to the public prosecutor whilst the latter refers to a prosecuting officer. It will be observed that in subsection (1) it is provided that the public prosecutor may inform the Court "he **will not** further prosecute the accused" whereas in subsection (2) it is provided that the prosecuting officer may inform the Court that he "**does not propose** further to prosecute the accused". It will also observed that the effect on the Court on being so informed is different between the two subsections. In subsections (1), the effect is that the Court **shall** stay all proceedings and the accused **shall** be discharged. There is, therefore, no discretion on the part of the Court; whereas subsection (2) merely provides that "all proceedings on such against the accused **may be stayed by leave of the Court** and, if so stayed, the accused **shall** be discharged." This seems to imply that where it is only the prosecuting officer that informs the Court, there is no automatic stay of proceeding; the Court still has some discretion. The Court may, if it thinks fit, refuse to stay the proceedings, which means that the prosecuting officer must proceed with the trial; and where the Court refuses stay of proceedings, the question of discharge does not arise.
- f* It may well be that, in any case where the Court thinks fit to refuse stay, the prosecuting officer may not be happy with the decision, but should that be the case then the latter should apply for, and the Court should grant, a short adjournment to enable the prosecuting officer to refer the matter to the public prosecutor for a directive. But I suppose it would be only in rare and exceptional cases where the Court would refuse a stay.
- g* However, if the Court grants the stay then the accused is entitled to an automatic discharge.
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- i* As provided by subsection (3) of s. 254, when an accused is discharged either pursuant to subsection (1) or subsection (2), such discharge does not amount to an acquittal, unless the Court directs otherwise. This means that the Court does have a power to order an acquittal. In view of this power conferred on the Court, the Court should always consider the question whether the discharge should amount to an acquittal or not. But before the

Court makes a decision, both the accused (or his Counsel, if represented) and the prosecution must be given the opportunity of being heard; the power should be exercised judicially. Normally, the discharge should amount to an acquittal, unless good cause is shown otherwise.

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In any case where it is the prosecuting officer (as opposed to the public prosecutor) who informs the Court, pursuant to subsection (2), that he does not propose to proceed further on the charge, he is under a duty to inform the Court of the reason and the Court should record the reason. In *Public Prosecutor v. Mat Zain* [1948-49] MLJ Supp 142 Callow J said:

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I presume the withdrawal was made by the prosecuting officer in accordance with s. 254 of the Criminal Procedure Code. This procedure may be caused by it becoming clear that the charge is not sustainable. (*Sohoni*, 14th Edn. page 651), or for reasons of expediency. The Court should record the reasons, and the discharge should amount to an acquittal unless good cause is otherwise shown; an accused person is entitled to trial and determination; only in exceptional circumstances should the charge be permitted to remain indefinitely held against him.

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Perhaps it is necessary for me to add here that even a prosecuting officer may act under subsection (1) if he directed by the public prosecutor not to proceed with the charge. But in doing so, the prosecuting officer should make it clear to the Magistrate Court or the Sessions Court or the Juvenile Court, as the case may be, that he is not proceeding further on the directive of the Public Prosecutor and that he is applying for a stay of proceeding and a discharge under subsection (1) of s. 254. Any officer, whether he is the public prosecutor or a prosecuting officer, when invoking subsection (1) of s. 254, is not bound to inform the Court his reason for not proceeding with the charge.

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Why does s. 254 makes a distinction and treats differently between a situation where the decision not to proceed is that of the public prosecutor and a situation where such a decision is that of prosecuting officer? The answer lies in the special powers of the Attorney General (who is the public prosecutor) on matter pertaining to criminal proceedings as conferred provided by Art. 145(3) of the Federal Constitution:

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145(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceeding for an offence, other than proceedings before a Syariah Court, a native Court or a court-martial.

And there is also s. 376 of the CPC. In the present case, perhaps it useful to refer to a passage in the judgment of Wan Yahaya J (as he then was) in *Poh Cho Ching v. Public Prosecutor* [1982] 1 MLJ 86 wherein the exercise of power under s. 254 and Art. 145 was clearly explained by his Lordship:

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This power, exercisable by the Public Prosecutor, who is the Attorney-General, is similar to the power to stay proceedings in English Courts and better known technically as *nolle prosequi*.

This power may be invoked by the Attorney-General in various instances, to cite one instance, in cases where he requires a co-accused to give evidence for the crown against the other accused person. This power undoubtedly confers upon the Attorney-General an unrestricted discretion in respect of which he is expected to exercise extreme fairness and sagacity. But whether he does so or not, it is not for the Courts to decide. The exercise of such power by the Attorney-General is not subject to control by our Courts but in most democratic governments is questionable elsewhere - perhaps in Parliament. It is not for the Courts, therefore, to enquire into the manner or reasons for the exercise of *nolle prosequi*.

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- a* In the absence of this information this Court is unable to imply that mere withdrawal of a charge against a co-accused by the public prosecutor presupposes that the co-accused had taken part in the offence.

The exercise of this power is also explained at length by the Supreme Court in *Public Prosecutor v. Zainuddin*. Salleh Abas LP in delivering the judgment of the Court said (at page 103):

- b* The law and constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him a complete trust in that the exercise of this power is his and his alone and that his decision is not open to any Judicial review. If he is a Minister of the Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the Government will answer for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will answerable also the Judicial and Legal Service Commission, though anomalously he is a member of it. Members of the public expect that he exercises his power *bona fide* and professionally in that when he prefers a charge against an individual he does so because public interest demands that prosecution should be initiated and when he refrains from charging an individual or discontinue a prosecution already initiated he also acts upon dictate of public interest.
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- d* In view of what I have said above, it is pertinent that a prosecuting officer when making an application under s. 254 of the CPC, should take pain to inform the Court in clear terms the position in which the decision not to proceed is made. What I mean is that he should inform the Court whether he, on his own initiative, proposes not to proceed any further on the charge, in which case he should apply under subsection (2) or whether he is directed by the public prosecutor not to proceed further on the charge, in which case he should apply under subsection (1). A prosecuting officer should not merely inform the Court in vague terms such as, for example, that he is applying for a discharge not amounting to an acquittal, as is quite commonly done. Such a practice must cease.
- e*

- f* For the reasons given above, I set aside the order of the learned Magistrate. I direct that this case be referred back to the Juvenile Court to enable the prosecution to make proper application under s. 254(1) or s. 254(2), as the case may be, and for the Court to make a decision and the appropriate order after due consideration of the circumstances and in accordance with all that have been said above and also in conformity with established principles.

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